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September 9, 2019

Via ECFS

Marlene J. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street SW
Washington, DC 20554

**Re: Commonwealth Edison Company's Reply in Support of its Application
for Review (Proceeding Numbers 19-169, 19-170; Bureau ID Numbers
EB-19-MD-004, EB-19-MD-005)**

Ms. Dortch:

Please find attached Commonwealth Edison Company's Reply in Support of its
Application for Review in Proceeding Numbers 19-169, 19-170; Bureau ID Numbers EB-19-
MD-004, EB-19-MD-005.

Sincerely,



Timothy A. Doughty
Attorney for Commonwealth Edison Company

Enclosures

cc: Rosemary McEnery, Enforcement Bureau
Lisa Saks, Enforcement Bureau
Adam Suppes, Enforcement Bureau
Anthony DeLaurentis, Enforcement Bureau

)	
Crown Castle Fiber LLC,)	
<i>Complainant,</i>)	Proceeding Number 19-169
)	19-170
v.)	Bureau ID Number EB-19-MD-004
)	EB-19-MD-005
Commonwealth Edison Company,)	
<i>Defendant</i>)	
)	

COMMONWEALTH EDISON COMPANY'S REPLY IN SUPPORT OF ITS APPLICATION FOR REVIEW

Introduction and Summary

Crown Castle is also far too assured of its interpretation of the ICC's letter and of Illinois state law. Crown Castle is simply incorrect when it asserts that the ICC lacks regulatory authority. The ICC's own letter states that the ICC has such authority, and Crown Castle concedes that the Illinois courts have so found. The ICC's letter does conclude that it lacks

¹ 47 C.F.R. § 1.1405(a).

authority, because its regulations do not “specifically” address telecommunications carriers. But the regulations do not need to “specifically” mention telecommunications carriers, so long as they cover all pole attachments, and Illinois regulations do.

Crown Castle urges this Commission to speed its deployment. But Crown Castle’s current attitude is entirely belied by the many years it waited to bring any complaint. More importantly, section 224’s legislative history – which Crown Castle entirely ignores – clearly states that federalism interests trump modest delays.

1. Crown Castle’s Interpretation of the FCC Rule Is Contrary To Text

Crown Castle concedes that the first two sentences of 47 C.F.R. § 1.1405(a) provide that a certification is “conclusive” and that a complaint “shall be dismissed.” But Crown Castle then argues that the remainder of the subsection – requiring a defendant or a state to prove, in each individual complaint, that the certification meets all of the regulatory requirements – applies even where a state’s certification has been accepted by the FCC. This cannot be right, for it nullifies the language that the certification is “conclusive.”²

That should be enough to dispose of the idea that the FCC, by text of some order (and not by rule amendment), “adopted a process” that disregards certification of all cases, always requiring defendants to prove that the certification was substantively correct.³ But it also misreads the FCC’s orders, none of which actually say that a certification must be defended in every individual proceeding. In the 1996 proceeding, the FCC reaffirmed “Congress’ clear grant

² See *Policy & Research, LLC v. United States Dep’t of Health & Human Servs.*, 313 F. Supp. 3d 62, 72 (D.D.C. 2018) (“Agencies have a duty to exercise their considerable discretion in a manner that conforms with the rule of law, which means that they cannot consider their decision-making to be constrained by some parts of a statute or agency regulation and not others. Where applicable, *all* parts must be given effect; thus, while an administrative agency can certainly ‘amend or repeal its own regulations,’ it is not free to ‘ignore or violate its regulations while they remain in effect.’”) (quoting *U.S. Lines, Inc. v. Fed. Mar. Comm’n*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978)).

³ Opp. at 11.

of authority to the states to preempt federal regulation”⁴ And the FCC did not change the rule that state certification was “conclusive.” Similarly, in the 1999 Reconsideration Order,⁵ the FCC acknowledged that its rules created two tracks, but the FCC’s order also refused to make a change to the rules. Crown Castle’s suggestion that “ComEd’s theory of events is based on an illogical scenario in which there is a claim a State regulates even though it has never certified under Section 224(c),”⁶ seems naïve, because of course a state might enact rules and otherwise regulate pole attachments without sending the FCC a certification, and the FCC’s rules allow an individual defendant in a pole attachment case to make such a determination.

Moreover, even if Crown Castle is correct in its reading of the FCC orders and rules (which it is not), the Enforcement Bureau’s refusal to grant the motion to dismiss as to Crown Castle’s rates complaint in Proceeding Number 19-170 is erroneous. The third sentence of 47 C.F.R. § 1.1405(a) refers only to “[a] complaint alleging a denial of access” – and that is the broadest applicability as well of the 1999 Reconsideration Order.⁷ Nothing in the rule or any order Crown Castle cites even plausibly touches on a rates complaint, and Crown Castle’s rate complaint should therefore be dismissed.⁸

The 1984 Amendments to section 224(c) do not change this conclusion. *See* Opp. at 6-8. In each of the 1985 and 1996 proceedings,⁹ the FCC refused to require new certifications from states, and in both of these proceedings the FCC did not change its rule that state certifications

⁴ *Implementation of Section 703(e) of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16016 (1996).

⁵ *Implementation of the Location Competition Provisions in the Telecommunications Act of 1996*, Report and Order on Reconsideration, 14 FCC Rcd. 18049 (1999).

⁶ Opp. at 15.

⁷ *See* 14 FCC Rcd. at 16016 (referring to access complaints).

⁸ Similarly, the FCC should not adjudicate any rates issue presented in the Access Complaint.

⁹ *See* Opp. at 7; *Amendment of Parts 1, 63, and 76 of the Commission’s Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 1985 FCC Lexis 3775 (1985); *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd. 6777, 6781 n. 20 (1998).

were “conclusive.”¹⁰ The FCC rules do not leave the FCC and parties without avenues to challenge a state’s certification, if the certification does not meet the requirements of section 224(c). The FCC gives public notice of state certification filings.¹¹ A party can challenge the FCC’s acceptance of a state certification through a declaratory judgment action, and this procedure would allow the state a full opportunity to address the matter. Indeed, the FCC’s regulations and the legislative history indicate that the FCC should defer to state proceedings, even in conditions of uncertainty over state law.¹²

2. Crown Castle Is Wrong About Illinois Law and the ICC Letter

Crown Castle is wrong about three aspects of Illinois Law. *First*, Crown Castle is wrong that the ICC “does not have regulatory authority” over all pole attachments.¹³ The Illinois Appellate Court held that it does (as Crown Castle actually concedes).¹⁴ And the ICC’s 2018 Letter affirms that the ICC could adopt rules under the Illinois Public Utilities Act.¹⁵ *Second*, Crown Castle is wrong that the Illinois regulations could not cover any pole attachment. The crucial regulation, 83 Ill. Admin. Code § 315.30, is not limited to CATV attachments, and the rate formula in 315.20 similarly could be used for pole attachments other than CATV. Federal law prefers state regulation, if possible.¹⁶

Third, the 2018 letter does not nullify the prior certifications. As ComEd explained,¹⁷ state regulations need not “specifically” address telecommunications carriers, so long as the rules can cover them, and the ICC’s conclusion was therefore wrong. Moreover, the ICC’s acting

¹⁰ 47 C.F.R. § 1.1405(a).

¹¹ 47 C.F.R. § 1.1405(c).

¹² See 47 C.F.R. § 1.1405(d) (certification brings even cases already pending at the FCC to state adjudication); *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utilities Elec. Co.*, 6 FCC Rcd. 7099, 7101 (1991).

¹³ Opp. at 1.

¹⁴ See *Cable Television Co. v. ICC*, 403 N.E.2d 287 (Ill. App. 2d Dist. 1980); Opp. at 19.

¹⁵ ICC Letter at 2 (App. Ex. B).

¹⁶ App. at 10-13.

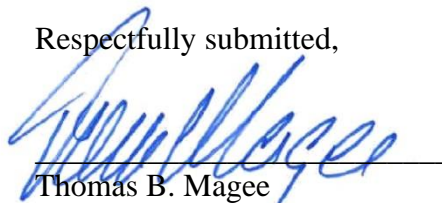
¹⁷ App. at 11.

without notice and comment means that its legal conclusions were not tested and therefore should not carry significant weight. Indeed, allowing a fulsome process at the ICC – the filing of a formal complaint or a declaratory judgment proceeding – would be more consistent with Congress’s view of federalism in pole attachment regulation: “The legislative history [of section 224] states that ‘The FCC shall defer to any State regulatory program under color of State law, even if debate or litigation at the State level is in progress.’”¹⁸

3. Dismissal Would Not Be Futile

Crown Castle argues that the Enforcement Bureau correctly found that FCC dismissal would be futile, but Crown Castle simply prefers an adjudicatory system different from the one that the FCC has put in place. The FCC’s Rules do require dismissal in cases in which the FCC has accepted a state certification, until such time as the state regulator fails to adjudicate a complaint filed at the state level.¹⁹

Respectfully submitted,



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¹⁸ Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order, 68 FCC 2d 1585, 1601 (1978) (quoting S. Rep. No. 95-580, 1st Sess., p. 17 (1977)), *aff’d*, *Monongahela Power v. FCC*, 656 F.2d 1254 (D.C. Cir. 1981) (following subsequent administration action).

¹⁹ Compare 47 C.F.R. § 1.1405(f) (providing that “[n]otwithstanding any such certification, jurisdiction will revert to this Commission” if a state commission does not act on the complaint within the required time period).

CERTIFICATE OF SERVICE

I, Timothy A. Doughty, hereby certify that on this 9th day of September 2019, a true and authorized copy of Commonwealth Edison Company's Reply in Support of its Application for Review was served on the parties listed below via electronic mail and was filed with the Commission via ECFS.

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